

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting the high bid for oil and gas lease parcel No. CO-096 and declaring lease bid deposits forfeited. COC 49457.

Affirmed.

1. Oil and Gas Leases: Competitive Leases: Generally

Pursuant to the provisions of 43 CFR Part 3120, a personal check is an acceptable method of payment for a bid submitted at a competitive lease sale. However, a personal check that is not honored by the bank does not constitute payment, absent an acknowledgement of error by the bank. A letter from the bank to BLM stating that a check was not honored because it was an "out-dated" check does not constitute an acknowledgment of bank error.

APPEARANCES: Jack Pennell, President, Twin Arrow, Inc., Grand Junction, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Twin Arrow, Inc., through its President, Jack Pennell, appeals from an April 11, 1989, decision of the Colorado State Office, Bureau of Land Management (BLM), rejecting the company's high bid for oil and gas lease parcel No. CO 096 offered at a competitive lease sale held by BLM on February 9, 1989. Twin Arrow was represented at the sale by Jack Pennell. Payment of the entire bonus bid, 1/ the first year's rental, and a \$75 administrative fee was made on check 101 in the amount of \$1,435, signed by Jack Pennell. The name of the bank appearing on the check is First Interstate Bank of Denver.

1/ Section 3120.5-2(b)(1) of 43 CFR requires payment of only the minimum bonus bid of \$2 per acre or fraction thereof on the day of the sale.

On February 16, 1989, Mr. Pennell's check was returned to BLM by The Women's Bank of Denver, the bank used by the Colorado State Office, marked "Account Closed." Ms. Donna L. Lord, BLM's Accounts Supervisor, attempted to contact Mr. Pennell by telephone at Twin Arrow's Grand Junction office to notify him of the situation. She was told he was out of the country (Affidavit of Donna L. Lord at 1). Thereafter, a "Notice of Return of Remittance," dated February 28, 1989, containing the following entry was sent to Mr. Pennell at the address shown on his returned check: "Check was returned by the bank as 'Account Closed.' Your oil and gas lease # COC-49547 has been terminated automatically by law. Return check attached."

On March 29, 1989, Ms. Linda L. Huff, Acting Chief, Fluid Minerals Adjudication Section, and Ms. Mary Patricia Nagel, a BLM examiner in the foregoing office, spoke with a Mr. Norris who was in BLM's public room and who had requested to discuss parcel No. 096. Mr. Norris stated that he represented Twin Arrow, Inc. Ms. Huff and Ms. Nagel advised Mr. Norris of the return of the check for parcel No. CO 096. Mr. Norris advised that the bank "had made a mistake" and that the company "was willing to do whatever was necessary to have the competitive parcel issued in its name" (Affidavit of Mary Patricia Nagel at 2). Ms. Nagel advised Mr. Norris that BLM might consider issuing the lease to Twin Arrow if, within 5 working days, Twin Arrow, Inc., were to submit (1) full payment by a form of guaranteed remittance, and (2) a statement from the bank attesting to bank error. 2/

The parties agree that on April 7, 1989, Mr. Norris hand delivered a cashier's check in the amount of \$1,435 and a letter of apology from the First Interstate Bank of Denver to BLM. The check was processed and presented for payment. However, on April 8, 1989, because the letter did not include a statement by the bank that it assumed responsibility for not honoring the first check, Ms. Nagel called Judy Thornton, the bank officer who signed the letter of apology. Ms. Nagel advised Ms. Thornton that BLM did not consider the letter from the bank as an admission of bank error and asked if the bank would write a letter specifically acknowledging error. Ms. Thornton replied that she could not write such a letter without approval from higher authority and that she would discuss the matter with her supervisor (Nagel Affidavit at 2). No further communication was received on this matter from First Interstate Bank.

The bank letter in question, dated April 6, 1989, reads:

Please accept this letter as our apology regarding the checks Mr. Pennell wrote to you. [3/] The checks he issued

2/ Section 3120.5-2(c) of 43 CFR allows the balance of the bonus bid to be made to the proper BLM office "within 10 working days after the last day of the oral auction."

3/ More than one check written by Jack Pennell to BLM had been returned by First Interstate Bank. These involved parcels not at issue here.

were outdated. He is a valued customer of First Interstate and has a large available balance on his credit card account.

If you have any questions please feel free to contact me directly at (303) 293-5718.

Judy Thornton
Merchant Sales and Service Representative

In its April 11, 1989, decision rejecting appellant's bid, BLM refers to the above letter, stating:

No statement attesting to the bank's error in not honoring the check is made in the letter. It specifically states "[t]he checks he issued were outdated." It is unlikely a financial institution would not notify customers of changes that would result in drafts being dishonored. Therefore, the bid is hereby rejected.

Appellant's statement of reasons in support of its appeal is brief and contains no legal argument or analysis. Instead, appellant offers its factual assessment and opinion as follows:

Jack Pennell attended the lease sale on February 9, 1989, as a representative of Twin Arrow, Inc. He utilized checks on his MasterCard account during this sale. First Interstate Bank of Denver, N.A., the bank honoring his MasterCard account, had changed his account number and, as an oversight, had not issued new checks on this new account number; therefore, he unknowingly used checks on the old account * *

On the morning of April 7, 1989, Mr. Jerrold Norris, a consulting geologist for Twin Arrow, Inc., hand delivered a check, along with the letter of apology from the First Interstate Bank of Denver, as full payment due on the parcel. Evidently this check was valid as it was cashed by the Bureau of Land Management. This fact alone should be sufficient evidence that Mr. Pennell's account was (and is) in good standing and that this was an error on the part of the bank. The bank should not have returned his checks. Even though the bank's letter does not assume full responsibility, their letter (copy attached) is very apologetic and indicates satisfactory coverage of the check. It even verifies that Mr. Pennell is a valued customer and continues to have a large balance available.

Reference is made to your comment in the "Decision" (Paragraph #2) about it being unlikely that a financial institution would not notify a customer of changes that would result in drafts being dishonored. This is a case where it was done and no notification was given; and that Mr. Pennell was not given the proper checks for his account number change (Notice of Appeal at 1-2). [Emphasis in original.]

In its answer, BLM submits that under the provisions of 43 CFR 3120.5-2, it is a clear requirement that "all specified payments be made on the same day a parcel is sold" and that, pursuant to 43 CFR 3120.5-3, "a bid constitutes a legally binding commitment to pay the bonus bid, first year's rental, and the administrative fee" (Answer at 4). BLM also argues that "a check which a bank has refused to honor is not a tender or payment of the required fee unless the refusal to honor was the result of bank error," quoting from Mary E. Cummings, 47 IBLA 10, 11 (1980). BLM advises that appellant has not shown error in the decision appealed from, and that, to the contrary, "the record before the Board fully supports that decision." Id. at 5. BLM is correct and its decision must be affirmed.

[1] Departmental regulations governing competitive lease sales of oil and gas are found at 43 CFR Part 3120. With respect to payments for bids, it is provided that they "be made in accordance with § 3103.1-1 of this title." 43 CFR 3120.5-2. Section 3103.1-1 specifies that remittances may be made by personal check, cashier's check, certified check, or money order.

The foregoing regulation, promulgated in 1988 (see 53 FR 22837, June 17, 1988), was obviously written with full awareness of longstanding Departmental precedent regarding the effect of remittance by personal check, viz., that submission of a check which is not honored by the bank does not constitute payment, see J. Martin Davis, A-26564 (Jan. 12, 1953), and the "bank error" exception to the foregoing rule, explained in Duncan Miller, 70 I.D. 113 (1963), and consistently followed by the Board throughout its 20-year history. See Mary E. Cummings, *supra*; Jose V. Lim, 44 IBLA 96 (1979); Charles P. Ricci, 33 IBLA 288 (1978); Jonathan T. Ames, 33 IBLA 1 (1977); Pauline V. Twigg, 31 IBLA 296 (1977); Wikoa Inc., 22 IBLA 6 (1975); Duncan Miller, 16 IBLA 379 (1974), appeal dismissed, Miller v. Department of the Interior, CV 76-48-BLG (D. Mont. Nov. 4, 1976); John S. Oakason, 13 IBLA 80 (1973); George E. Conley, 9 IBLA 302 (1973), and cases cited therein.

In this case, appellant's representative, Mr. Pennell, has alleged but not proved that his check for parcel No. CO 096 was not honored by the bank as a result of bank error. Notwithstanding that BLM never directly contacted Pennell when it found the bank's letter unsatisfactory as an admission of error, nothing has been submitted by either Pennell or the bank that would cause us to believe that BLM's interpretation of the bank's letter was incorrect. All the bank is willing to state is that Mr. Pennell used "outdated" checks. This is not a showing of bank error and the bank admits to no error. Cf. Duncan Miller, 16 IBLA 379 (1974) (check returned because of a "stale date" written on the check does not constitute bank error and no bank official acknowledged error).

The burden is on appellant to prove error in the decision appealed from. Where the issue involves alleged error by the bank in refusing payment on a check tendered by a payor, mere assertion of error by the payor is not sufficient. Jonathan T. Ames, *supra*. This comports with well-established Board precedent that an unsupported allegation of error is insufficient and that an appellant who does not support allegations with

evidence showing error cannot be afforded favorable consideration. See Leonard J. Olheiser, 106 IBLA 214 (1988); United States v. Conner, 72 IBLA 254 (1986). Conclusory allegations of error, standing alone do not suffice. United States v. DeFisher, 92 IBLA 226 (1986). When a party has relevant evidence within its control which it fails to produce and such evidence would be expected to be produced under the circumstances, such failure gives rise to the inference that the evidence is unfavorable. Patrica C. Alker, 79 IBLA 123 (1984); Hal Carson, Jr., 78 IBLA 333 (1984).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton

Chief Administrative Judge

I concur:

R. W. Mullen
Administrative Judge